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In The

Supreme Court of the United States

October Term, 1995

SOUTHEASTERN EXPRESS CO., ET AL.,

Petitioners,

vs.

TRIAD SYSTEMS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF INDEPENDENT SERVICE NETWORK INTERNATIONAL IN SUPPORT OF PETITIONERS

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I. INTEREST OF *AMICUS CURIAE*[1]

Independent Service Network International ("ISNI") is an organization of over 200 independent service organizations ("ISOs") that service equipment manufactured by others. The members of ISNI service high-technology equipment, ranging from computers to copiers to medical equipment. These organizations account for $1.5 billion in commerce and are located in 11 countries.

ISNI is a non-profit corporation incorporated in the District of Columbia; its purpose is to promote and maintain a closer union and more complete organization of independent service organizations. ISNI develops educational methods to increase awareness about third-party maintenance organizations and studies economic problems confronting the industry. Additionally, ISNI serves as a clearing house for information and data relating to its members' businesses, and promotes better relations among providers, distributors and manufacturers of supplies and services.

Most, if not all, ISNI members offer service for products that contain software. Generally, high-technology equipment cannot run without what is called operating system software. That software instructs the computer or other high-technology equipment how to function. In repairing high-technology equipment, it is necessary to

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[1] Counsel of record have consented to the filing of this *amicus* brief, and letters to that effect have been filed with the Clerk pursuant to Supreme Court Rule 37. Counsel of Record for Southeastern Express Company, Ronald S. Katz, is the General Counsel for Independent Service Network International.

turn a computer or other type of equipment on in order to determine that a repair has been successful.

Because of the nature of its members' businesses, ISNI is concerned about the ramifications of the Ninth Circuit's opinions in *Triad Systems Corporation v. Southeastern Express Co., et al.*, 64 F.3d 1330 (9th Cir. 1995), and *MAI Systems Corporation v. Peak Computers*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994). In *Triad*, the Ninth Circuit adopted the court's reasoning in *MAI*, which concluded that where computer operating system software is licensed to the owner of a computer system, ISOs cannot turn on the computer and temporarily load the operating system into the computer's random access memory ("RAM") without violating the Copyright Act. This effectively precludes any use or maintenance of the computer by non-licensed parties.

The Ninth Circuit also held in *Triad* that use of computer software does not constitute a fair use under Section 107 of the Copyright Act. This is a dangerous precedent for ISNI members because those members provide service on high-technology equipment; they are not in the business of manufacturing or developing software.

ISNI submits this brief as an *amicus curiae* because these holdings will have serious negative consequences for those who own, use or maintain computer systems, including ISOs. If ISOs cannot turn on a customer's computer and load its operating system into RAM, they cannot test the operation and functioning of the computer; only very limited servicing of the computer, if any, can be performed. Thus, if this decision stands, it will preclude ISOs from servicing any high-technology equipment that

has an operating system. This would result in the destruction of a large part of the independent service industry for high-technology equipment. It would also force owners and users of high-technology equipment with operating systems to use only manufacturer-provided service, even if it is more costly and less efficient. If *Triad* is allowed to stand, then it will render meaningless this Court's decision in *Eastman Kodak Co. v. Image Technical Services, et al.*, 504 U.S. 451 (1992).[2]

II. SUMMARY OF ARGUMENT

The *Southeastern* case, and the *MAI* case on which it is based, will have a broad-ranging impact on all companies that service high-technology equipment. The decision will affect not only those companies that service computers, but also companies that service any type of equipment that uses software to operate, such as medical imaging equipment, automobiles, and other high-technology equipment. The Ninth Circuit's adoption of the *MAI* decision, which held that turning on a computer's operating system constitutes a copy for purposes of the Copyright Act, will create *de facto* monopolies for manufacturers because manufacturers will be the only outside maintainers who are permitted to use the operating systems under the *Triad* and *MAI* cases. As a result, many ISNI members, which are small companies, will be driven out of business. This will result in less competition and higher prices for consumers.

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[2] ISNI also filed an *amicus* brief in the *Kodak* case.

Moreover, the Ninth Circuit's decision in *Triad* that use of computer software by a third party does not constitute a fair use under 17 U.S.C. Section 107, threatens to undermine ISNI's members. This is particularly true where, as in this case, no copies of computer programs were proliferated. This Court's intervention is needed to prevent manufacturers from driving ISOs out of business, which would result in severe harm not only to the service industry, but to any consumer who owns high-technology equipment.

III. ARGUMENT

A. If the *Triad* decision stands, consumer choice will be hindered because independent service companies will no longer be able to perform their function in this economy.

When consumers purchase high-technology equipment, they not only purchase the hardware, but also purchase the ability to maintain their equipment. The hardware would be of no use to the purchaser unless it could be maintained to run to its specifications. From a consumer's point of view, being able to access all of the material that comes with a machine when it is purchased is part of the functionality of the machine. No consumer in his right mind would purchase a machine – for example, a car – unless that consumer believed that he would be able to have the machine maintained.

The *Triad* decision destroys the consumer's expectation that his machine can be maintained because of the court's holding that turning on a computer creates a copy of a software program. This holding strains credulity

because an ISO that performs service at a customer site does not leave that customer site with any copies of computer software. When the ISO finishes performing service, the customer has exactly the same number of software programs as the customer did when the ISO entered the customer site. No copies whatsoever are proliferated. The work is simply used – just as reading a borrowed copyrighted book is a use of that book, not copying or infringement. To hold that copyright infringement occurs with mere use is unprecedented and has no foundation in copyright law.

The *Triad* court's ruling essentially permits manufacturers to copyright the functionality of a machine and thereby prevent computer owners from using anyone but the manufacturer for service. This holding will prevent ISOs from being able to do their jobs, which includes repairing a machine for a consumer who bought it and expected (and had a right to expect) that he was buying maintainability along with hardware. This result will prevent consumers from having a choice of service provider, thereby injuring the substantial service industry in the United States.

This result is in sharp contrast to a situation where a manufacturer sells or licenses a diagnostic separately from a piece of hardware. In those cases, a consumer would not have an expectation that he would be able to use that software in order to keep the machine functioning to its specifications.

The copyright laws require courts to balance the rights of a copyright holder against the rights of the

general public to access to copyrighted works. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.") Review of the *Triad* decision is necessary so that this Court can correct the imbalance created by the Ninth Circuit.

B. An entire industry, as well as competition in many aftermarkets, will be destroyed if the *Triad* decision stands.

The service industry makes up a large part of the U.S. economy. Many participants in that industry are independent service organizations. ISOs do not manufacture the equipment they service, and ISOs do not develop operating system software. ISOs do provide competition with manufacturers for the repair of high-technology products. It is well-recognized that the presence of ISOs in the service aftermarket has provided a continually steady influence on the quality and the prices of high-technology product maintenance and repair. This has greatly benefitted the consuming public, who would otherwise have to deal with a *de facto* monopoly on the service of that brand of product by the manufacturer.

Given their position in the industry, ISOs will be at the mercy of computer manufacturers. If the panel's decision stands, ISOs will be able to service a customer's machine without violating the Copyright Act only if the ISO is licensed to load and use the computer's operating system, which in nearly all cases would be economically

prohibitive. At the best, it would give the manufacturer power – by setting the price of the software – to eliminate service competition, for which the manufacturer has no copyright, patent or any other legal monopoly.

Where a computer manufacturer develops or licenses a proprietary operating system and competes with ISOs for the business of servicing the computer, as many do, this licensing to ISOs is unlikely to occur. In effect, those computer manufacturers that have developed or licensed copyrighted operating system software will be able to foreclose others from servicing the computers. Customers will no longer be able to choose ISOs for service of those computers, and thus will have no choice but to contract with the manufacturer for service. Without the competition from ISOs, it is most likely that the costs to consumers for maintenance and repair would escalate dramatically.

This anomalous result is inconsistent with recent Supreme Court case law. In *Kodak*, the Supreme Court recognized the "magnitude of the [independent] service business." *Kodak*, 540 U.S. at 462 n.6. The Court stated that "the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service." *Id.* at 462. ISOs and manufacturers of a single brand of equipment compete for the service business of that equipment. Because each manufacturer's high-technology equipment is unique, ISOs must have the special expertise required to service the machine, as well as access to parts and other tools necessary for service.

The effect of the *Triad* decision will be that manufacturers will deny ISOs access to the tools necessary to maintain high-technology equipment. This means that even if an owner of a high-technology machine wants to use an ISO for service, that owner will not be able to do so since ISOs do not by definition manufacture software and will not have access to that software from the manufacturer. This result is directly contrary to this Court's decision in *Kodak*, which held that the antitrust laws prohibit "the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously." *Kodak*, 504 U.S. at 485. In rejecting Kodak's claim that ISOs were free-riding on Kodak's investment in parts, this Court held that "[t]his understanding of free-riding has no support in our caselaw." *Id.*

The *Triad* court, by contrast, reached a different result, holding that "Triad invented, developed, and marketed its software to enable its customers and its own technicians to service Triad computers. Southeastern is getting a *free ride* when it uses that software to perform precisely the same service." *Triad*, 64 F.3d at 1337. The Ninth Circuit's opinion essentially requires all independent service companies to manufacture their own software before they can compete with manufacturers. This result is in direct conflict with this Court's *Kodak* opinion.

C. Construing the Copyright Act to confer a monopoly on copyright holders will destroy the service industry.

The *Triad* court's adoption of the *MAI* decision has the effect of conferring a copyright holder with absolute

power over a copyrighted work and the associated computer hardware. Copyright holders are afforded many protections under the Act; those protections, however, are balanced against the public's right to the free flow of information. A copyright holder's power over a product is not absolute.

The Ninth Circuit's decision effectively confers a service monopoly on Triad and other manufacturers that develop copyrighted operating systems for use in their computers. Under the Ninth Circuit's reasoning, only the computer owner/licensee, a limited number of its employees and Triad may load the operating system into the computer's RAM. This means that the manufacturer controls not only the operating system, but also the use of that operating system in conjunction with the computer and, thus, the computer itself. This anomalous result is contrary to the public policy underlying the Copyright Act, namely the free flow of information.

D. The Ninth Circuit's decision that use of computer software by an independent service company does not constitute a fair use will have a severe impact on the service industry and on consumers.

One of the more significant limitations on a copyright holder's exclusive rights is the doctrine of fair use. 17 U.S.C. §107.[3] This flexible doctrine permits courts to

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[3] Courts consider four factors in determining whether use of a copyrighted product constitutes fair use:

(1) the purpose and character of the use, including

avoid rigid application of the Copyright Act and to balance the equities where strict application of the Act would have unintended consequences. It allows a court to apply an "equitable rule of reason" analysis to particular claims of infringement. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 (1984).

The Ninth Circuit's *Triad* decision rejects fair use out of hand as a defense to the use of a copyrighted computer program by an ISO. In so holding, the court found that "Southeastern is simply commandeering its customers' software and using it for the very purpose for which, and in precisely the manner in which, it was designed to be used. As a result, the copies made by Southeastern while servicing Triad equipment have undoubtedly diminished the value of Triad's copyright." *Triad*, 64 F.3d at 1336.

This curious reasoning flies in the face of a basic fact: the customer licenses this software. A customer would obviously not pay an additional license fee for an ISO to use the software to maintain the equipment when the customer had already paid a license fee to the manufacturer. Moreover, there is no reason for an ISO to pay the manufacturer a second license fee just so the customer can maintain his or her machine when the customer

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whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §107.

should have the right to do so by paying only one license fee.

The Ninth Circuit's faulty reasoning applies not only to the facts of the *Triad* case, but also could apply to all ISOs. The Ninth Circuit's holding eviscerates both an ISO's ability to service high-technology equipment and a customer's right to choose the company that services his equipment. Contrary to the Ninth Circuit's statement, ISOs do not "commandeer" software for their own purposes. High-technology equipment owners hire ISOs to service their equipment because they can get the same quality service at lower prices. Those equipment owners have almost universally already licensed the software at issue from the manufacturer. The result of the *Triad* decision is that owners of high-technology equipment will continue to pay license fees, but will have no choice of service provider.

Moreover, the Ninth Circuit's holding concerning the diminution of the value of Triad's copyright is erroneous. The temporary loading of a copy of an operating system program into RAM clearly does not affect the potential market for that work. No permanent copies are made for sale, transfer or other redistribution. An ISO's use of computer software does not affect a computer manufacturer's ability or right to sell other computers that contain the operating system software, or to license additional copies of the operating system. Indeed, the presence of ISOs in the marketplace may enhance a manufacturer's sales of computers that contain operating systems, as customers have more choices of service providers if ISOs continue servicing the equipment.

Finally, the Ninth Circuit's holding that Southeastern offers "no appreciable public benefit" could be applied to all ISOs, and is thus a dangerous precedent. The public benefit that ISOs bring to the computer service business is readily apparent; ISOs offer customers a choice of service provider, and generally offer customers lower prices for maintenance, thereby enhancing competition. *See Kodak*, 504 U.S. at 462.

IV. CONCLUSION

If the Ninth Circuit's decision on fair use is not reviewed, ISOs will no longer be able to continue servicing high-technology equipment, virtually all of which is run in some manner by software. An entire industry, not merely the parties' interest in this case, is at stake. This Court's review is necessary to protect the high-technology service industry in this country from Ninth Circuit decisions that are wrong as a matter of law, fact and policy. More important, this Court must protect the public's right to access to copyrighted works and the ability to choose a service provider.

Respectfully submitted,

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